IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

No. 194.

THE SUPREME LODGE, KNIGHTS OF PYTHIAS OF THE WORLD, *Plaintiff in Error,* vs. **LILLIAN H. BECK,** *Defendant in Error.*	In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

Brief for Plaintiff in Error.

This is an action on a certificate of life insurance for $3,000, issued by the plaintiff in error to Frank E. Beck, in favor of defendant in error, his wife. The action was commenced in the District Court of Montana. The complaint was amended by stipulation so as to recite that the defendant "is a corporation incorporated under the act of Congress of "May 5th, 1870, relating to corporations in the District "of Columbia, and reincorporated under the act of Congress "of June 29th, 1894, entitled 'an Act to incorporate the "Supreme Lodge, Knights of Pythias.'" (Rec., 5.)

The plaintiff in error is a fraternal and benevolent society.

The action was begun on the 13th day of April, 1897, and on the 29th day of October, 1897, was removed to the Circuit Court of the United States for the Ninth Circuit, where a trial was had before Hon. Hiram Knowles and a jury, and

a verdict was returned for the plaintiff for three thousand dollars, the full amount of the certificate. (Rec., 10.) Judgment was entered on said verdict on the 19th day of May, 1898. At the close of all the evidence the defendant, by its counsel, moved the court to direct the jury to return a verdict for the defendant. (Rec., 46.) This motion was overruled, to which action of the court the defendant excepted. (Rec., 48.) A bill of exceptions and demurrer to the evidence was allowed on the 7th of June, 1898. (Rec., 54.) Assignments of error were filed on the 29th day of June, 1898, and a writ of error issued on the same day (Rec., 63), to the United States Circuit Court of Appeals for the Ninth Circuit.

That court, on the 16th day of May, 1899, rendered an opinion affirming the judgment of the trial court. (Rec., 67.) A writ of error was allowed on the 20th day of September, 1899, to this court, and on the same day assignments of error were filed. (Rec., 80.)

The ground of federal jurisdiction on which removal was obtained is the incorporation of the defendant under act of Congress.

The defenses set up by the answer were (1) suicide, (2) death caused or superinduced by violation or attempted violation of law, these being excepted risks under the by-laws of the defendant. (Rec., 7.) The defendant acknowledged that under its by-laws the beneficiary was entitled to receive on the policy $138, in case the death of the assured were due to suicide, averred that that amount had been tendered to the beneficiary and paid the same into court on filing its answer. (Rec., 8.)

The certificate of life insurance on which this action is founded was issued by the plaintiff in error on April 16,1895, to Frank E. Beck, in favor of defendant in error, his wife.

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The insured died on the 31st of October, 1896, at Helena, Montana, where he was engaged in the laundry business. At the time of his death, the insured was 35 years of age (Rec., 13), and had been married to the defendant in error about five years, and had one child—a little girl. (Rec., 41.) His death occurred on Saturday, at about 8 o'clock in the evening, from the discharge of a shotgun, which he had taken with him to the house of a friend of the family, with whom his wife had taken refuge, in consequence of a quarrel with the deceased two or three days before, in the course of which he had threatened to kill her. The uncontradicted evidence establishes that the deceased had gone to the house in pursuit of his wife, and was making his third attempt within two hours, to either get into the house, or to compel his wife to come out of it, when he met his death.

At an inquest held on the following Sunday, the plaintiff testified (Rec., 19), that the deceased had been drinking heavily during the past two years; that he had threatened several times to take her life; that he was always drinking when he made these threats; that she had frequently to go out at night to get a physician to quiet him; that on the Wednesday preceding his death, he came home in the afternoon and slept till about 6 o'clock; that after eating his supper he went downtown and came home after 12 o'clock and was "quite drunk"; that he commenced to sharpen a carving knife and was doing so for about an hour; that he came into the room of the witness to take the child from her, seizing the witness by the wrist, and that, on the child refusing to go with him, he went to another room, slammed the door, and went to bed. Before retiring he hid the knife, and the servant had some difficulty in finding it. On the following day, which was the Thursday before his death, while the plaintiff was returning to the house with the de-

ceased, she urged him to stop drinking, and said, that she would not live with him if he did not, to which he replied, "You have got to, or I will kill you." She went to his office with him and tried to make her escape while he was in the back part of it, but he watched her and followed her home. On the next day she left the house for a time and on her way home she saw him on the street "staggering drunk." Seeking to avoid him, she turned onto another street, and she met her servant girl, who said, "Mrs. "Beck, don't go home; he has got the gun and will "kill you." From the testimony of this girl given on the trial (Rec., 33), it seems that she had, by direction of Mrs. Beck, hid Beck's guns, of which he owned three, because of his threats against his wife's life. Mrs. Beck then took the child and went to a friend's house (Rec., 19 and 41), where she remained until the afternoon of Saturday, but left there because the deceased had discovered where she was, and went to the house of another friend, Mrs. Nolan. This lady, was the wife of the lawyer who represented Mrs. Beck in the trial of this action, but who unfortunately was absent from the city at the time of the occurrences here in evidence; and Mrs. Beck and Mrs. Nolan were alone on the premises when Beck made his first visit to the house, about six o'clock in the afternoon. Earlier in the day Beck had sent the servant girl to Mrs. Beck's first place of refuge to get the child, and on learning that Mrs. Beck had left that house, he got a gun and said, "Well, I will go hunting." (Rec., 34.) Beck's guns had been hidden by the servant girl, and he had gone down town, after 4 o'clock, and procured a gun from the gun store. The evidence tends to show that this was the gun which he took with him when he went in pursuit of his wife. He had this gun in his hand, when he reached the Nolan residence. Mrs. Beck says that he tried to get in by the kitchen door. "Failing to get in, he tried the front

"door, and commenced to bang at the door, but I did not "speak at all. We (Mrs. Beck and Mrs. Nolan) went "upstairs and looked out the bathroom window and we "could see quite well. He had a gun in his hand. * * * "He was gone perhaps an hour and returned, but I could "not say whether he was alone or not." (Rec., 19, 41.) While away the deceased had met his partner, Mr. Votaw, and the latter returned to the Nolan house with him on his second visit. (Rec., 36.)

Votaw testified at the Coroner's inquest (Rec., 21) that deceased had been addicted to drinking heavily for the preceding two years, but had not been drinking for six weeks prior to his death, until "about four days ago," that is, the preceding Wednesday, when he had the altercation with his wife above referred to. Votaw stated that on the fatal day he had met Beck about 7:30 P. M. He (Beck) had not been to the office that day, and Votaw stated that he had received a telephone message from him during the afternoon, saying that he wanted to see him. Beck's behavior that day about the gun had so alarmed the servant girl that she had gone down to the laundry to inform Votaw of it. (Rec., 22.) On meeting Votaw, Beck began talking about his family troubles, and requested Votaw to go to Mr. Nolan's and tell his wife that he wanted her to come home with the little child "right away." Beck accompanied the witness to the house, and his manner must have alarmed Votaw, who cautioned him "not to do anything rash; there are other ways "of settling this difficulty without doing anyone any harm." On arriving at the house the following account is given by this witness of what took place (Rec., 22):

"When we got there on the porch he rattled on the door "and Mrs. Nolan said, 'Who is there?' He said to me, "'Answer her.' I then said, 'Is Mr. Rasch here?' She

"replied, 'No.' Frank Beck says, 'Hattie (Mrs. Nolan), "let me in.' She says, 'The folks have all gone to bed; come "back in the morning.' That seemed to make him mad, "and he commenced to hammer on the door, and I said to "him, 'Don't do that, Frank. Come away.' I became ex-"cited then and I thought of running for help. I ran up to "the corner and thought to call for help. The noises had "ceased then and I went around the next corner of the ad-"joining block, and I thought he was following me. Not "seeing him, I went back as far as the vacant lot where I "could see and hear everything for a space of about ten min-"utes. Not hearing anything, I went to where my engage-"ment called me, and when I got there it was about 8 o'clock. "* * * To go back a little, while Beck was at Nolan's "front door trying to get in, he said unless his wife let him "in he would kill her. He seemed very much excited while "he was pounding on the door."

After this vain attempt to get into the house, Beck went off and procured a gun, no doubt, the one which he had brought with him on his first visit, and which he had concealed somewhere in the meantime. A neighbor, Mr. Frank L. Reece, had been warned by Mrs. Nolan of Beck's actions on his first visit, and had telephoned to the police department for help. Samuel A. Lynch, an officer, was sent in a hack to the Nolan house. There he met Reece, and these two, with the hackman, Gordon, are the principal witnesses as to what occurred after that time. Just as they reached the house they heard the crash of a pane of glass in a window on the side of the house. (Rec., 20.) Reece and Lynch entered the house, under the impression that Beck had effected an entrance. (Rec., 36.) While they were searching for Beck in the house the hackman, standing outside, heard Beck retreating to the rear of the lot, where he entered an

outhouse water closet. (Rec., 33.) The hackman went to the front door and informed Reece and the officer of what he had seen and heard of Beck's movements. The hackman then went to the rear of the house; he was separated from Beck by a lattice work fence, which apparently obstructed the public view of the doorway to the closet. After reaching this position, he heard Beck *step out of the closet and then the discharge of a gun.* (Rec., 37.) *The precise interval of time* between Beck's exit from the closet and the discharge of the gun is not stated, but *it was sufficient to enable the witness to separate them*, and to state, that the discharge of the gun *followed* the sound of Beck's footfall upon the walk. An attempt was made to confuse the witness upon this point, and to make him say that he was uncertain whether Beck fell or stumbled out of the closet, but he was firm upon the point that the sound which he heard was that of a man *stepping down*, and not of a man *stumbling out* of the closet, the floor of which, as appears from the evidence, was somewhat elevated above the plank walk outside. (Abst., 38.)

The position of the other two witnesses at this precise moment is not very clear, but neither of them professes to have seen or heard anything of Beck's movements prior to the discharge of the gun. After that took place, all three went to the closet and found Beck lying on his back partly in and partly out of the closet, with his head in the corner and his feet hanging out over the door sill. (Rec., 37.) The gun with which he had been killed lay between his legs, and the top of his head was blown off, the shot having struck his right eyebrow. (Rec., 26.) The left barrel of the gun was loaded and cocked, the right barrel unloaded and not cocked.

This is substantially all that the testimony disclosed as to the facts immediately surrounding the death of Beck. Owing to the darkness of the night and the intervening lat-

tice work, Gordon, the hackman, could not, apparently, distinguish Beck's movements and necessarily relied more on his sense of hearing than his sense of sight. No one else either saw or heard what occurred at the supreme moment; but the circumstantial evidence, which is abundant, and in entire accord with the testimony of this witness, leaves the mind in no doubt as to whether Beck's death was voluntary or involuntary.

On the day after Beck's death, Sunday, November 1, 1896, an inquest was held, and the following verdict was returned:

"STATE OF MONTANA, COUNTY OF LEWIS AND CLARKE, ss.—In the Matter of the Inquisition upon the Body of Frank E. Beck, Deceased.

"An inquisition holden at Helena, in the County of Lewis and Clarke, on the first day of November, A. D. 1896, before me, Thomas H. Pleasants, Coroner of said county, upon the body of Frank E. Beck, there lying dead, by the jurors, whose names are hereunto subscribed, said jurors upon their oaths do say that Frank E. Beck came to his death on the 31st of October, 1896, by shooting himself in the head with a double-barrel shotgun, with the purpose and intent of committing suicide, while temporarily insane, due, probably, to the use of intoxicants. That the shooting was done in the outside water-closet of the premises now occupied by the family of C. B. Nolan, and that he threatened to kill his wife before killing himself.

"In testimony whereof the jurors have set their hands the day and year aforesaid.

(Signed) R. H. BECKWITH,
(Signed) LOUIS J. ISRAEL,
(Signed) C. A. CAHILL,
(Signed) A. H. LYNN,
(Signed) J. S. ALLING, JR.,
(Signed) A. B. COOKE.

Attest: THOMAS H. PLEASANTS, *Coroner.*"

(Rec., 23.)

On the 11th day of November, 1896, twelve days after Beck's death, the plaintiff made proofs of loss on the blanks furnished by the defendant for the purpose, in which it was stated as follows:

"7. (A.) What was the disease during last illness? (A.) Insanity. (B.) What was the immediate cause of death? (B.) Personal violence. * * *

"9. Duration of last illness? Give full particulars in relation thereto. Details given in evidence attached hereto.

"10. Had the deceased any previous disease, and if so, when and what was the nature of the same? None other than insanity known to affiant.

"11. Give the date as near as possible when health of deceased first became impaired? Particulars appear in testimony. * * *

"13. Was an inquest held? If so, furnish herewith copies of the evidence and finding. Yes; evidence attached.

"14. Was death caused by suicide or violence or from other than natural causes? Suicide." (Rec., 16.)

The evidence attached to this proof of loss was a certified copy of the report of the Coroner's inquest, and the proofs of loss, with this report attached, were offered in evidence by the defendant (Rec., 19), and were received without objection by plaintiff.

Numerous errors were assigned in the trial court and in the Circuit Court of Appeals (Rec., 72-80), but the following only are urged upon the attention of this court.

The Circuit Court of Appeals erred in giving judgment affirming the judgment of the Circuit Court. (Assignment of error XXXII, Rec., 80.)

The Circuit Court erred in overruling and denying the motion of the defendant, made at the close of the evidence in the case, to instruct the jury to bring in a verdict for the defendant. (Assignment of error I, Rec., 72.)

The court erred in sustaining plaintiff's objection to the testimony offered by the defendant as to the character of the guns carried in stock by the witness Doughty, and to the effect that said witness had in his possession several lengths of guns, called the Belgian gun, some long barrels and some short barrels, and that so far as the recollection of the witness is concerned he does not know whether it was a long or short barreled gun that was borrowed by Mr. Beck. (Assignment of error II, Rec., 72.)

The court erred in sustaining plaintiff's objection in objecting to allowing, and in refusing to allow, the witness Lindner to jar the stock of the gun on the floor with the hammers raised to see whether it would go off from a jar. (Assignment of error III, Rec., 72.)

The court erred in overruling defendant's objection and permitting the witness O. G. Beck to use in illustration, the long-barrel gun, as there was no evidence that there was used in the killing of Beck any particular gun, and especially no evidence that the gun used in illustration, did the killing. (Assignment of error IV, Rec., 73.)

The court erred in sustaining the plaintiff's objection and not permitting the defendant to ask the plaintiff the following question: "Is it not a fact, Mrs. Beck, that you have "stated to a great number of persons in speaking about this "case that there was no question but that Mr. Beck com- "mitted suicide, but the company couldn't prove it?" (Assignment of error VIII, Rec., 73.)

The court erred in refusing to give the following instructions tendered by the defendant. Assignments of error, XII and XIII; Rec., 74.)

"Gentlemen of the jury, you will notice that in the proofs of death made and furnished to the defendant by the beneficiary, Lillian H. Beck, the plaintiff herein, under the policy

or certificate upon which this suit is brought, it is stated under oath that the death of Frank E. Beck resulted from suicide. Under the law, this throws the burden of proof on the plaintiff to show that the statements in the proofs of loss as to the manner of the death of Frank E. Beck were made by mistake, or under a misapprehension of the facts, and unless the statements made by her in the said proofs of loss so furnished to the said defendant as to the manner of the death of Frank E. Beck are overcome by proof adduced by her, showing that her husband came to his death by accident or some other causes other than suicide, the proofs so furnished stand as conclusive evidence of the cause of death of the said Frank E. Beck, and you will find that he committed suicide, in accordance therewith, and your verdict must be for the defendant.

"The jury are instructed that as a matter of law governing cases of this character it is held that representations made in the proofs of death as to the manner of death of the assured are intended for the action of the insurance company, and upon the truth of such representations the company has a right to rely, and that the party making such representations must be held to them until it is shown that they were made under a misapprehension of the facts, or in ignorance of material matters subsequently ascertained. The burden put upon the plaintiff by the representation of suicide makes the case one where she must show that her husband did not purposely kill himself."

The court also erred in giving that part of its charge which reads as follows (Assignment of error, XXX; Rec., 79):

"It has been stated here in the argument, and I told Mr. Loeb I would not give it, that when there is this admission on the part of the plaintiff that death was occasioned by suicide, that then the burden of proof is shifted, and it was necessary for the plaintiff to show that it was accidental. If the proofs overcome this admission and showed that it was not correct—that it was wrong—why, then, it should not control your action. In no case that I know of is such a rule maintained, unless by some decisions in regard to insur-

ance companies. A man may admit something from a lack of knowledge upon the subject, but if it turns out afterwards that he was misinformed, that he had not any adequate knowledge upon the subject, that admission may be disregarded, and should be disregarded. A man is only estopped from denying his admissions and declarations when it would work a fraud upon the other party, and there is no claim in this case—no claim that it would work a fraud upon the defendant in this respect."

The court also erred in instructing the jury as follows (Assignment of error, XXXI; Rec., 80):

"There is only evidence before you that he was killed by a gun discharged through his head, and whether that was done with the intent by himself to commit suicide is for you to determine. If you are unable to determine that fact, then you should find for the plaintiff, because the presumption is that he didn't do it intentionally."

The court erred in refusing to give the following instructions tendered by the defendant (Assignments of error, XIV and XVI; Rec., 75):

"That if the jury find that Frank E. Beck's death occurred while violating the criminal laws of the State of Montana, or while in an attempt at the violation thereof, no matter what they believe was the cause of death, suicide or accident, the plaintiff can not recover under this policy and you will find a verdict for the defendant."

"If Beck died while attempting to or while violating the criminal laws of the State, plaintiff has no claim under the contract between Frank E. Beck and the defendant that would entitle her to a verdict, and you are instructed if you find he was attempting to violate, or was violating the criminal laws of this State at the time of his death, the plaintiff can not recover, and you will find for the defendant."

The court erred in giving the following instruction as part of its charge to the jury (Assignment of error, XXIX; Rec., 79):

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"Here is an instruction asked, which I refused, and I wish to state here that is the instruction that if Frank E. Beck was violating any law at the time he was killed, why under the policy he can not recover—under the by-laws. As I understand that by-law, it must be a case where a man is in the act of violating the law. For instance, if a man in breaking into a house is killed in the act, he can not recover. If a man is in a quarrel and gets killed, he can not recover. But if a man, contemplating that he was going to kill his wife if she didn't go home with him, but was not in the act and doing that at the time he was killed, that clause of the policy does not apply."

The court erred in giving the following part of the charge as given: "The investigation narrows itself down to the "question as to whether the death of Frank E. Beck was "an act of suicide, whether voluntary or involuntary, while "sane or insane, or whether it was accidental." (Assignment of error XXII.)

I.

The evidence given on the trial, with all the inferences that the jury could justifiably draw from it, in favor of the plaintiff, was insufficient to support a verdict for the plaintiff, and the court should have directed a verdict for the defendant.

Randall v. *Railroad Co.*, 109 U. S., 478.
Pleasant v. *Fant*, 22 Wall. (U. S.), 116.
Herbert v. *Butler*, 97 U. S., 319.
Bowditch v. *Boston*, 101 U. S., 16.
Griggs v. *Houston*, 104 U. S., 553.
Elliott v. *Railroad Co.*, 150 U. S., 245.
Railroad v. *Houston*, 95 U. S., 597.
Schofield v. *Railroad Co.*, 114 U. S., 615.
Aerfketz v. *Humphreys*, 145 U. S., 418.
Union, etc., R. Co. v. *McDonald*, 152 U. S., 262, 283.

Delaware, etc., R. Co. v. *Converse,* 139 U. S., 469.
Anderson County v. *Beal,* 113 U. S., 227, 241.
Somerville v. *Indemnity Co.,* 11 App. Cas. (D. C.), 417.
Agen v. *Metropolitan Life Ins. Co.* (Wis.), 80 N. W., 1020.
Northwestern, etc., Assn. v. *Maguire,* 19 Oh. C. C., 502.
Sovereign Camp v. *Haller* (Ind.), 56 N. E., 255.
Merrett v. *Assn.* (Minn.), 57 N. W., 169.
Kornfeld v. *Supreme Lodge,* 72 Mo. App., 604.
Ingraham v. *National Union* (Ia.), 75 N. W., 559.
Agen v. *Metropolitan Life Ins. Co.* (Wis.), 80 N. W., 1020.
Rens v. *Assn.* (Wis.), 75 N. W., 99.
Mutual Life Ins. Co. v. *Hayward* (Tex. Civ. App.), 27 S. W., 36; 34 S. W., 801.

II.

The testimony of the witness Doughty, as to the character of guns which he kept for rent, offered by the defendant and excluded by the court, was competent, relevant and material.

III.

The demonstration sought to be made before the jury of the qualities of the gun produced in court, offered by the defendant and excluded by the court, was competent, relevant and material evidence.

IV.

The experiment made before the jury by the witness O. G. Beek with the gun produced in court but not identified as the gun with which the deceased was killed, was incompetent, irrelevant and immaterial.

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V.

The question addressed to the plaintiff while testifying as a witness in her own behalf as to the declarations made by her as to the cause of her husband's death, and excluded by the court, was competent, relevant and material.

VI.

The admission in the proofs of loss presented by the plaintiff, of the suicide of the deceased, destroyed the legal presumption in favor of accidental death and made a prima facie case for the defendant, which, in the absence of countervailing evidence, would have required a verdict for it; and the plaintiff, to overcome this prima facie case, was required to present sufficient evidence to more than offset the affirmative evidence thereafter presented by the defendant.

Mutual Benefit Life Ins. Co. v. *Newton*, 22 Wall. (U. S.), 32. *Ibid*, 38.

Sharland v. *Washington Life Ins. Co.*, 101 Fed., 206.

Hanna v. *Connecticut Mut. Life Ins. Co.*, 150 N. Y., 526.

Spencer v. *C. M. L. Ins. Assn.*, 142 N. Y., 505, 510.

Prudential Ins. Co. v. *Brenstle* (Ky.), 41 S. W., 9.

Keels v. *Mutual Reserve Assn.*, 29 Fed. Rep., 198.

Cochran v. *Mutual Life Ins. Co.*, 79 Fed., 46.

Dennis v. *Union Mutual Life Ins. Co.* (Cal.), 24 Pac., 120.

Spruill v. *Northwestern Mut. Life Ins. Co.* (N. C.), 27 S. E., 39.
Scott v. *Wood*, 81 Cal., 398.

VII.

The charge to the jury, contained in assignment of error XXXI was erroneous.

VIII.

That part of the defendant's answer setting up the defense of death caused or superinduced by the violation or attempted violation of the criminal laws, is sufficiently certain and definite, in the absence of a demurrer to the pleadings or the evidence, or other appropriate objection to its defects, at or before the trial.

Montana Code of Civil Procedure, Sec. 740 (1895).
Ibid, Sec. 770.
Ibid, Sec. 778.
Cal. Code Civ. Proc., Sec. 475.
Colo. Code Civ. Proc., Sec. 81.
N. Y. Code Civ. Proc., Sec. 723.
Ore. Code Civ. Proc., Sec. 104.
Weston, etc., Co. v. *Uhlhorn* (La.), 6 So., 486.
Crawford v. *Satterfield*, 27 Oh. St., 421.
Bethel v. *Woodworth*, 11 Oh. St., 393.
Erwin v. *Shaffer*, 9 Oh. St., 43.
Burke v. *Wilbur*, 42 Mich., 327.
Griffin v. *Pratt*, 3 Conn., 513.
Hall v. *McKechnie*, 22 Barb., 244.
Page v. *Monks*, 5 Gray (Mass.), 492.

Boyce v. *State Co.*, 25 Cal., 47.
Bell v. *Knowles*, 45 *id.*, 193.
King v. *DeCourcey*, 8 Colo., 463.
McDermott v. *Grimm*, 4 Colo. App., 39.
Sibila v. *Balmey*, 30 Oh. St., 399.
Cummings v. *Petch*, 41 Minn., 115.
Coates v. *First National Bank*, 91 N. Y., 31.
Gillies v. *Improvement Co.*, 147 N. Y., 420.
Egert v. *Wicker*, 10 How. Pr., 193.
Salazar v. *Taylor*, 18 Colo., 538.
North Star, etc., Co. v. *Stebbins*, 3 S. D., 540.
Stokes v. *Brown*, 20 Ore., 530.
Dunn v. *Durant*, 9 Daly, 389.
Catlin v. *Gunther*, 11 N. Y., 373.
Dunn v. *Durant*, 9 Daly, 389.
Railway Co. v. *Dailey*, 110 Ind., 75.
Warbritton v. *Demorett* (Ind.), 28 N. E., 613.
Quirk v. *Clark* (Mont.), 14 Pac., 669.
Pettis v. *Westlake*, 4 Ill., 535.
Malcolm v. *O'Reilly*, 89 N. Y., 156.
Doyle v. *Knapp*, 4 Ill., 334.
Began v. *O'Reilly*, 32 Cal., 11.
Engel v. *Hardt*, 56 Wis., 456.
Paul v. *Silver*, 16 Cal., 75.
Mulliken v. *Hull*, 5 Cal., 245.
Coleman v. *Playstead*, 36 Barb., 26.
Clark v. *Dales*, 20 Barb., 42.
Railroad Co. v. *Lindsay*, 4 Wall., 656.
Ewing v. *Howard*, 7 Wall., 500.
Stockton v. *Bishop*, 4 How., 155.
Conroy v. *Assn.*, 17 Ind. App., 62; 60 Am. St. Rep., 154.

IX.

The undisputed evidence establishes beyond question that the death of the deceased, if not suicidal, was caused or superinduced by the violation or attempted violation of the criminal law, and the court should have given the instructions tendered by the defendant as to this defense.

Murray v. *Life Ins. Co.*, 96 N. Y., 614.
Bloom v. *Franklin Life*, 97 Ind., 478.
Neill v. *Ins. Co.*, 31 Up. Can. C. P., 394.
Hatch v. *Ins. Co.*, 120 Mass., 50.
Ins. Co. v. *Seaver*, 19 Wall., 531.
Duran v. *Life Ins. Co.* (Vt.), 22 Atl., 530.

ARGUMENT.

I.

At the close of all the evidence the defendant, by its counsel, filed a motion to direct the jury to return a verdict for the defendant, which motion was overruled. (Assignment of error II.) The following, among other grounds were assigned in support of said motion:

"That under all the evidence herein adduced, a verdict for the plaintiff could not be supported in law.

"That under all the testimony herein adduced, there is no conflict upon the point that the death of Frank E. Beck occurred while said Beck was attempting to and was violating the criminal law of the State of Montana, which of itself would defeat any right said beneficiary would have to recover under the contract of insurance herein."

The two defenses asserted by the answer were (1), suicide; (2) death caused or superinduced by violation or attempted violation of the law. We contend that the evidence established beyond a reasonable doubt that death was due to

suicide; but, even if the jury were at liberty to disregard the conclusive evidence of suicide and guess that Beck's death was accidental, then, on the undisputed facts, his death was caused or superinduced by violation or attempted violation of the law, and the court should have given the above instruction.

The following facts, established by the evidence, show plainly that Beck was a suicide:

1. His family troubles.

2. His homicidal disposition, evidenced by repeated threats to kill his wife or take his own life.

3. The fact that he had been drinking heavily for four days or more.

4. The criminal impulse shown by his procuring the rented gun.

5. His extreme excitement and violent passion immediately preceding the fatal act.

6. His apprehension of arrest and punishment.

7. The positive testimony of Gordon, the hackman, as to what actually occurred.

8. The position in which the body was found.

9. The absence of powder burns.

10. The impress of the gun barrels near the wound.

11. The nature of the wound.

12. The absence of any circumstance to support the theory of accidental death.

13. The universal opinion, shared by Mrs. Beck and her attorney, that he committed suicide.

Beck's family troubles are clearly shown by the evidence of his wife (Rec., 19, 41), of his partner (Rec., 22, 36), of his brother (Rec., 39), of Hilda Carlson, a former servant

in the family (Rec., 29), and of Hilda Borg, the servant at the time of Beck's death (Rec., 33)—in fact of every one testifying at the inquest or trial who knew anything of the family history. The testimony of Mrs. Beck and of the two servant girls abounds with instances of quarrels so acrimonious that the plaintiff was exasperated at times to the point of throwing knives and inkstands at her husband (Rec., 29, 44), while the latter appears to have exhausted every form of outrage and insult which a drunken man can inflict upon a helpless woman, not stopping short of physical indignities. His affection for his child, instead of moderating his behavior towards his wife, appears to have been an additional cause of contention, as is often the case where the husband abandons himself to his appetite for drink. The wife in such a case naturally resents, not only the indignities heaped upon herself, but the shocking example afforded to her child by the recreant father. Undoubtedly this domestic discord was the primary source of the suicidal impulse which resulted in Beck's death.

Beck's frequent threats, especially when in liquor, to kill his wife and to terminate his own existence, of which there is abundant testimony in this record from the lips of Mrs. Beck and the two servant girls (Rec., 29, 35, 43), indicate that lack of mental balance which too often seeks refuge from its self-created troubles, in suicide. The utterance of such threats, whether the intention was really entertained at the time or not, indicates a nervous organization and mental constitution liable to result, under some sudden conception of imaginary wrong or gust of unreasoning passion, in violence to himself or others. He was in this irresponsible mood on the day of his wife's flight, and her flight indicates conclusively that his manner in making the threat was such as to inspire extreme fear.

"I was afraid that Mr. Beck was going to kill me be-
"cause I told him I wouldn't go home until he stopped
"drinking. I was just afraid. He made threats against
"my life; he said if I did not go and live with him he would
"kill me; that was within a month of the time of his death;
"he said it before that too; I can't tell how long. I went
"back to Mr. Beck with the understanding that he was to
"stop drinking, but not two years ago; I think it was six or
"seven weeks before he died. That was about the time he
"threatened to kill me, and that was why I left." (Rec., 43.)

While there is some evidence of other causes of dispute on which we do not care to dwell, the evidence is abundant that Beck's family troubles were due principally to his indulgence in liquor. His wife had left him for this reason some six weeks before his death, on which occasion, as well as on the occasion of their last quarrel, he had threatened to kill her (Rec., 43), but had returned to him on his promise of amendment. Hilda Carlson, who had worked for the Beck family for two or three years ending in July, 1895, detailed numerous instances of his giving way to his appetite for drink. After one of his debauches, some four or five months before she left the place, she had a conversation with him on the subject. "I asked him why he didn't quit drink-
"ing. Mr. Beck made the remark one time that a man that
"had as much trouble as he had would be better off dead than
"living." (Rec., 29.) "I remember of calling Mr. Beck's
"attention to the fact that he was drinking heavily, and he
"says, a man that has as much trouble as he had, the sooner
"the end came the better." (Rec., 29.) "Mr. Beck came
"home drunk quite frequently while I was there. * * *
"Three months to my recollection is the longest period he
"went without being drunk." (Rec., 30.) The testimony

of Hilda Borg, who succeeded Miss Carlson in the Beck household, and of Mrs. Beck herself, confirm the testimony of this witness as to Beck's habits for two years or more preceding his death.

So far as the record shows, Beck had kept his promises of amendment, made six weeks before his death, until four or five days before that event. He came home on Tuesday or Wednesday night after midnight "quite drunk," as his wife stated, and remained in that condition until the day of his death.

His conduct at this time was so offensive and alarming to his wife that on Thursday or Friday (the evidence is not clear which), she took the child and left the house, concealing from him the place to which she had gone. (Rec., 41.) It is not surprising that Beck, under such circumstances, should continue his debauch and perhaps push it to even greater excesses, as is indicated by the testimony of his partner (Rec., 22), that he did not come to the office at all on Saturday, and of the servant girl (Rec., 33), that he remained in bed on that day until 4 o'clock in the afternoon. A prolonged debauch with the resulting disorder of the nervous system strongly impels the victim to self-destruction or other homicidal crime. He ceases to be a moral agent and loses the capacity of apprehending the dictates of duty or realizing the consequences of his acts.

After Mrs. Beck's flight from her home, in consequence of the statement made to her by Hilda Borg, "He has got the "guns and will kill you," it would seem that the latter must have hidden the guns again, for she testified that, after making a fruitless search for them on Saturday (Rec., 33), Beck went down town and returned with a gun, which the evidence clearly shows to be the rented gun. (Rec., 34.) This was after he had gotten up, at 4 o'clock in the afternoon.

He returned to the house with this gun and then went out "hunting" his wife. Beck's actions at this time do not indicate that he had formed the intention of committing suicide, unless, perhaps, as a sequel to a more atrocious crime of which his wife should be the victim. The most charitable construction that can be put upon his actions is that his drink-sodden brain had formed the design of terrorizing his wife into returning home or giving up the child. But whatever his intentions may have been, his going to a gun store and possessing himself of a gun in the absence of the proprietor, with which gun he subsequently went to Mr. Nolan's house (Rec., 34), and there made a demonstration so alarming that the ladies appealed to a neighbor for protection, and all this in the daytime and in the sight of everybody—indicates a settled purpose of mischief and a condition of total irresponsibility, equally favorable to suicide or murder.

The evidence furnished by several witnesses, including Mrs. Beck, Mrs. Nolan, Mr. Votaw, Mr. Reece and the servant girl, Hilda Borg, is conclusive that Beck was in a frenzy of passion when he went to the Nolan house. In broad daylight he first attempted to force an entrance through the kitchen. He then tried the front door, and not being successful there, began pounding or kicking on it. He had the gun with him on this first visit. This frantic conduct was repeated when he returned to the house in about an hour, accompanied by his partner, Votaw, whom he had met on the street. He had hidden the gun in the meantime, probably in the closet. The cunning and mischief of a lunatic are shown by his trick of inducing Votaw to inquire if "Mr. Rasch" was there, doubtless hoping that Mrs. Nolan or Mrs. Beck would be deceived into opening the door, not knowing he was present. His persistence in returning a third time about 7:30 or 8 o'clock P. M.—this time with the gun which he had hid-

den before making his second visit—hammering and kicking at the door, and, on failing to secure admission, breaking a window in order to effect an entrance, just as the policeman reached the house—these facts indicate that his frenzy had reached its climax.

It is impossible to conceive of a state of mind more favorable to suicide than that of Beck at this moment. His actions present an ascending scale of probabilities, each indicating more strongly than the last the frame of mind in which a man must find himself before the instinctive shrinking from death is overcome and he defies "the Almighty's canon against self-slaughter." If anything further was required to urge the wretched man to the last act of a miserable life, it was the arrival of the officer. As his carriage drove up he was met by Reece and they entered the house together, just after Beck had broken the window, expecting to find him within. Defeated in his criminal purpose, with arrest and a disgraceful punishment in prospect, suicide, to which his mind naturally recurred when under the influence of liquor, appealed to him with irresistible force. After what appears to have been a foolish attempt at concealment in the outhouse he stepped out of the door, and, resting the gun on the ground and his head on the muzzle, blew his brains out.

That this is no fancied picture of what actually occurred, all the physical facts attending the death of the unfortunate man attest. The clumsy theory of Beck having forgotten the step and fallen as he came out of the closet is directly opposed to the testimony of the hackman, Gordon. He stated that he heard Beck *step out* of the closet before the gun was discharged, and in spite of a severe cross-examination, he adhered to this statement, repudiating the suggestion that Beck might have *fallen out,* as inconsistent with what he actually heard. If Beck had fallen, *the discharge must have*

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followed so close upon the sound of the gun striking the walk that they would have been indistinguishable. Moreover, the shock of the gun striking the sidewalk would also have been utterly unlike the footfall of a person stepping down to the walk.

This theory also disregards the elementary laws of physical science in regard to moving bodies. The position in which the body lay shows beyond question that Beck was not *falling forward* when he was killed. He lay on his back, on the floor of the closet, with his feet projecting from the door and the gun lying between his legs. That is the natural position for the body to assume when death results from a gun pointing upward and backward and the head resting on the muzzle, the position in which a suicide would naturally hold the weapon. The force of the blow drives the head back and the body follows it. It is impossible to conceive of any way in which the accidental discharge of the gun, caused by Beck's stumbling or falling out of the closet, could have produced this effect. The effort to establish the possibility that the gun might have been discharged by the butt being struck forcibly against the ground was an absolute failure, as we shall show; but conceding, for the purpose of argument, that it might have been done, *it would have been impossible for the body to fall as it did.* The gun must have been carried in front of Beck, muzzle up; he must have fallen with sufficient force to discharge it and he must necessarily have fallen forward towards the gun. In such a case, the butt striking the ground while Beck, grasping it somewhere along the barrel, continued to fall forward, the muzzle would have been pushed further away from Beck as his fall continued and the shot would have been harmlessly discharged into the air.

But, waiving the insuperable difficulties which we shall

show in the theory of accidental discharge, and assuming that, as a fact, the gun did manage to discharge itself accidentally, and that the shot did strike Beck, the momentum of his body, projected forward from the closet by his misstep, would have carried him on, in spite of the blow from the shot, and he would have fallen *out of the closet on his face and on top of the gun*, instead of, *in the closet, on his back, with the gun on top of his body.* It is true that the velocity of the load from a shotgun is several hundred feet per second as contrasted with the probable velocity of a few feet per second of a man's body falling forward from a misstep; but an average man's weight is 150 pounds, while the weight of a load of shot is not more than an ounce and a half. *There is no imaginable combination of circumstances consistent with the established facts, which will admit of Beck's having accidentally killed himself, and then fallen in the position in which he was found.*

The undertaker who prepared the body for burial testified that there were no powder burns on the face of the deceased. After qualifying as an expert, he testified, that, where death results from a gunshot wound inflicted by a firearm in the hands of the deceased, powder burns are always found if the weapon is not held against the body. This is a matter of common knowledge and of obvious necessity, even to those who have had no practical experience of the fact.

Several witnesses testified as to the appearance of the face of the deceased, but none of them contradicted the witness as to the absence of powder burns. The theory of accidental discharge of the gun therefore requires that Beck's face struck the muzzle of the gun at the *precise moment* that the load left the barrel. If it had not reached the barrel in his supposed fall, his face would have been powder-burned; if it had reached it before the discharge, the forward move-

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ment of his body would have thrown the barrel from him and the shot would not have struck him. The theory of accidental death requires that the gun should have been discharged during a period of time measured by a minute fraction of a second. It also requires that Beck's head should have been in a *horizontal instead of a vertical position*, that the gun, the stock of which was necessarily held above the floor of the closet and the feet of Beck, should have been jerked down by him, on missing his footing, so as to strike the ground before his feet did; that Beck, instead of falling forward in a heap, or recovering himself by a recoil of his head and body,—the ordinary and customary result of missing one's footing in the way supposed in this case,—should have doubled up at the hips, like a clasp knife, throwing his head down upon the muzzle of the gun; that the gun should have been held at such a distance from him that, on his body describing this extraordinary movement, his head could come in contact with the muzzle at the moment of discharge, instead of being projected far beyond it, as would have been the case if Beck had been holding the gun close to his body a person usually holds a gun when he is carrying it muzzle upwards. Is it possible to conceive of a worse maze of improbabilities and impossibilities than this singular theory requires us to assume?

The undertaker also testified that the flesh of the deceased showed the impress of a gun barrel on the left side of the face under the eye and against the bridge of the nose. (Rec., 26.) The testimony of the witness as to this fact is confirmed by one of the jurors (Rec., 28) and by Mrs. Beck herself. (Rec., 42.) This is quite consistent with the theory of intentional suicide; but, like the absence of powder burns, it requires the supposition, on the theory of accident, that the face of the deceased struck the muzzle of the gun at

the precise moment when the load was expelled from the barrel. This fact of the impress of the muzzle was made much of in the brief of opposing counsel in the court below, probably because it is *the only fact fully established by the evidence which is not absolutely irreconcilable with the theory of accidental discharge.* The mark might have been made by Beck falling on the gun, just as it might have been made by his pressing the gun against his face; but, as we have shown, the overwhelming probability is in favor of the latter supposition.

The nature of the wound is quite consistent with the theory of suicide and absolutely inconsistent with the theory of accident. The top of the skull was blown off. (Rec., 26.) It is a matter of common experience that suicides who kill themselves by means of a gun invariably direct the weapon towards the brain rather than the body, because death is certain and instantaneous and the length of a gun barrel makes the brain the only vital organ which can be conveniently reached when that weapon is used. But if the weapon is accidentally discharged, the position of the wound would be largely governed by the doctrine of chances; and it is, as already pointed out, difficult, if not impossible, to conceive of any relative position of the gun and the body of the deceased which could result in the accidental shooting away of the top of the skull. Combined with all the other circumstances, this improbability verging upon impossibility, is most persuasive evidence of suicide.

In the absence of any other testimony, this evidence, confirming the admission of the plaintiff in the proofs of death, established beyond question the fact of suicide. An effort was made, however, to furnish some testimony in support of the theory of accidental death.

The evidence relied on to sustain this theory consisted of:

1. A demonstration in the presence of the jury that a gun, exhibited in the court room but *not identified as the gun with which Beck had been killed*, was so long in the barrel (*thirty-two inches*) that *the brother of the deceased* could not reach the trigger while the muzzle was pressed against his forehead. (Rec., 38.)

2. The opinion of a gunsmith that a gun might be discharged by forcibly striking the butt against the ground, though the same witness testified that *the gun in court* had a *trigger pull of about nine pounds* (!) and that it had "binding" (an obvious stenographer's error for "rebounding") locks, *which would prevent its being discharged except by pulling the trigger.* (Rec., 40.)

This is all the evidence which was adduced in support of the theory of accidental discharge of the gun that killed the insured. As to the first item, in addition to the fatal infirmity already pointed out, in the failure to identify the gun produced in court, it is proper that we should call the court's attention to the very peculiar condition of the evidence in regard to the gun, the discharge of which resulted in the death of Beck.

Beck was making an attack on the house of Mr. Nolan, a friend of the family, during Nolan's absence from the city. The persons who found his body immediately after death and the gun with which his life had been ended, were Mr. Reece, the next door neighbor of Mr. Nolan, Lynch, an officer of the law, and the hackman who had brought him there. Reece and the hackman testified at the trial, but strange to say, *neither of them was asked whether the gun in the court room was the gun found by Beck's body.* The natural course was to turn the weapon, with which the wound had been inflicted, over to the coroner, and there is evidence

in the record, produced by defendants in error, to the effect that this was done. (Rec., 39-46.) The gun was doubtless delivered to Beck's family after the inquest. Mrs. Beck and her attorney undoubtedly knew of the custody from which the gun produced in the court room came, and, if it had been Beck's gun or the gun with which Beck killed himself, some one could have identified it positively and given its history since that fatal night. But, searching the record from end to end, *not a word is found which could have justified any reasonable man in believing that it was Beck's gun, or any evidence at all that it was the gun with which Beck was killed, which was produced in the court.* Mrs. Beck testified that it looked like his gun, but qualified even this indefinite language with the statement that "all guns look alike "to me!" Yet Mrs. Beck was sufficiently familiar with fire arms to have a gun of her own, with which she appears to have joined in field sports with her husband. (Rec., 41, 45.) She certainly knew as a fact, whether the gun in question was her husband's gun, for if it was, it must have been produced by her; and her failure to so state is *conclusive evidence that it was not.* Beck's brother testified that the gun in court "looked very much like" the gun of the deceased. Yet this witness was in his brother's employ and had lived in his house for four years. (Rec., 38.) *But no one testified that the gun in court was the gun with which Beck was killed.*

This was all the evidence as to the identity of the gun produced in court. Some effort was made to induce the Swedish girl, who was working for the Beck's at the time, to say, that Beck had taken the longest of his guns when he went "hunting" for his wife (Abst., 35), but her testimony upon this point is confused, more or less contradictory, and, so far as it tends to throw any light on this question, is un-

favorable to the plaintiff. At one time she stated that it was the rented gun, and her account of his looking for his guns, and on failing to find them, going down town and returning with another gun, shortly after which he set out to "hunt" Mrs. Beck, strongly confirms this statement. *She was not even asked if the gun in court was the gun which he took with him when he started on his fatal errand.*

On the whole evidence, therefore, it appears (1) either that Beck was killed with the rented gun, or (2) that if he was killed with one of his own guns, which one, whether the "long gun" or the "short gun," was not shown, (3) that the gun produced in court was not identified as Beck's gun or the gun by which he was killed, *although the evidence as to both facts must have been abundant and within the control of the plaintiff.*

What, then, is to be thought of this total failure of proof as to the vital fact on which plaintiff's whole case depended? To this question there can be but one answer—that the gun with which Beck was killed was *too short for the misleading experiments before the jury,* of the witness Beck, the brother of the deceased, and *that the gun produced in the court room was not the gun which was found by the body of the deceased.*

Thus the evidence produced in support of the plaintiff's theory of Beck's death, not only did not tend in the slightest degree to establish that theory, but, by reason of the omission above pointed out, to identify the gun in court as the gun by which Beck was killed, and the uncontradicted testimony of the gunsmith, produced by plaintiff, *that the gun in question could not have been discharged by a jar,* it really strengthens the theory of suicide. If the verdict of the jury is to stand, it must stand, not on the evidence introduced by the plaintiff as to these matters, but on the evidence intro-

duced by the defendant as to what actually occurred at the time of Beck's death.

We have already pointed out the utter absence of any circumstance which could afford a rational support for belief in the accidental discharge of the gun. It is inconceivable that Beck could have forgotten, in the short space of time that separated his entrance to the closet from his exit therefrom, that there was a step up from the plank walk to the floor of the closet. That interval was the time required for the hackman to run to the front door of the house and give notice to the policeman of Beck's presence in the backyard, and then to return to his position in the sideyard, just as Beck stepped out of the closet and blew out his brains. We are required to believe, on the theory of accident, that Beck had forgotten this fact and had stepped out of the door expecting to find the walk on a level with the floor, and so, had been thrown forward on the gun,which was discharged by the shock. No evidence was adduced from which such a fact could be inferred; it is a matter of naked guess work. The jury in entertaining so baseless a conjecture disregarded all the facts in evidence and substituted therefor the mere suggestions of their own imaginations.

What other construction can be put on their verdict? In the record are found two lines which dispose absolutely of any contention that there was evidence before the jury on which, as reasonable men having regard for their oaths, they were justified in believing that Beck was killed by the accidental discharge of the gun. Mrs. Beck, who was present at the trial and heard all the evidence (Rec., 44), and who was familiar with every fact in the case, when examined by her counsel as to her testimony before the coroner's jury and the proofs of death to which she had sworn, said: "*I "don't know whether Mr. Beck committed suicide or whether*

"he died accidentally. I don't know now." (Abst., 43.) Though under a strong personal bias by reason of her interest, the plaintiff was unable to say that she believed her husband had met his death through accident. Yet the jury were able to give a verdict in her favor when she herself could not. Is there any theory of the sanctity of the juror's office which can uphold such an abuse of its powers?

> "It is the settled law of this court that when the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant."
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> *Randall* v. *Railroad Co.*, 109 U. S., 478; citing
> *Pleasant* v. *Fant*, 22 Wall. (U. S.), 116.
> *Herbert* v. *Butler*, 97 U. S., 319.
> *Bowditch* v. *Boston*, 101 U. S., 16.
> *Griggs* v. *Houston*, 104 U. S., 553.

To the same effect are

> *Elliott* v. *Railroad Co.*, 150 U. S., 245.
> *Railroad* v. *Houston*, 95 U. S., 597.
> *Schofield* v. *Railroad Co.*, 114 U. S., 615.
> *Aerfketz* v. *Humphreys*, 145 U. S., 418.
> *Union, etc., R. Co.* v. *McDonald*, 152 U. S., 262, 283.
> *Delaware, etc., R. Co.* v. *Converse*, 139 U. S., 469.
> *Anderson County* v. *Beal*, 113 U. S., 227, 241.

> "As was said by this court in the case of *Improvement Co.*v. *Munson*, 14 Wallace, 448, recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there

is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.

"It is the duty of a court in its relation to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in these issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, and, finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law.

"In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor, that is the business of the jury, but conceding to all the evidence offered the greatest probative force which, according to the law of evidence, it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court, after a verdict, to set it aside and grant a new trial."

Pleasants v. *Fant*, 22 Wallace, 116, 121, 122.

In the case of

Herbert v. *Butler*, 97 U. S., 319,

this court said:

"We decided in *Improvement Company* v. *Munson*, 14 Wallace, 442, and *Pleasants* v. *Fant*, 22 Wallace, 116, that although there may be some evidence in favor of a party, yet if it is insufficient to sustain a verdict so that one based thereon would be set aside, the court is not bound to submit the case to the jury, but may direct them what verdict to render. As the question is

fully discussed in those cases it is unnecessary to repeat the discussion here."

In a case where all the facts pointed, as in the case at bar, to suicide and not to accidental death, it was said:

> "*Mere wild conjecture* as to the cause of death will not suffice to overcome clear and definite proof. It is true that in case of real doubt, the presumption is against the fact of suicide. But where *the evidence is all on one side and that of a character to establish beyond a reasonable doubt the fact that suicide had been committed,* the ordinary presumption opposed to that fact can not be allowed to counteract and destroy the rational conclusion deducible from such clear and definite proof. Here the claim of the plaintiffs is attempted to be supported upon the surmise that the assured may *have come to his death* by accident or by the hand of a robber or in conflict with some unknown person. But each and every circumstance in proof tends directly and with a force that can not be resisted to repel such hypotheses."
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> *Somerville* v. *Indemnity Co.*, 11 App. Cas. (D. C.), 417.

Where the reasonable probabilities from the evidence all point to suicide as the cause of death, so as to establish it in the light of reason and common sense with such certainty as to leave no room for reasonable controversy on the subject, a jury should not be permitted to find to the contrary, and have such finding stand as a verity in the case, but the question should be decided by the trial court as one of law.

> *Agen* v. *Metropolitan Life Ins. Co.* (Wis.), 80 N. W., 1020.

Where the only persons who saw the deceased at the time of his death stated that he put the pistol to his head and fired it, the court held that, there being no evidence of ac-

cidental death, a judgment for the plaintiff could not be allowed to stand.

> "Where there is manifestly no evidence to support the verdict of a jury, then a reviewing court is justified and it is its duty to interfere when the verdict is predicated on no evidence or when there is not sufficient evidence to warrant the conclusion of the jury."
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> *Northwestern, etc., Assn.* v. *Maguire*, 19 Oh. C. C., 502.

Where the deceased, on being unexpectedly served with notice of a divorce suit and an order restraining him from entering the family homestead, disappeared, and was found drowned in the creek, on the bank of which his hat was found, near tracks leading down to the water and none coming out, it was held that the evidence of suicide was conclusive and that a verdict for the plaintiff could not be sustained.

Sovereign Camp v. *Haller*, 56 N. E., 255 (Ind.)

Where in an action upon a policy of life insurance, the evidence was slight as to how the deceased came to his death, but such evidence as there was, favored the theory of suicide, the judgment for the plaintiff was reversed and a new trial was not granted.

> "Of a half dozen or more possible theories, the jury have found one *inconsistent with what little evidence there is, and base a verdict upon it.* Until there was *some evidence* tending to show that death resulted from accident rather than design, or from natural causes, such as apoplexy or heart failure, there was nothing to go to the jury. * * * Until some proof is offered tending to establish one of several equally reasonable theories, some consistent with the theory of accidental death and some inconsistent with it, a case is not made out."
>
> *Merrett* v. *Assn.* (Minn.), 57 N. W., 169.

Where the deceased, a waiter in a restaurant, after shooting another waiter, rushed into a toilet room, whence a pistol shot was heard in about two minutes, and he was found dead from the effect of a pistol shot through the head, no other person being present in the room at the time, it was held that a peremptory instruction in favor of the defendant should have been given, and a judgment for the plaintiff was reversed without remanding.

Kornfeld v. *Supreme Lodge*, 72 Mo. App., 604.

The likeness of this case to the case at bar is most striking. The deceased in both cases, was laboring under violent excitement; he had just committed an offense against the laws for which he had reason to apprehend a severe punishment; and in either case the supposition of accident requires the assumption of absurd improbabilities. The only difference lies in the fact that in the Missouri case there were *no facts absolutely irreconcilable with the theory of accident*, while there are many in this case.

Where the deceased, a public officer, was found on Sunday morning in the vault of his office, ten minutes after two pistol shots had been heard, dying from the effect of two pistol shot wounds, in the side of his head, a pistol kept in the vault lying beside him, the evidence leaving no room for the supposition that the wounds had been inflicted by another, a verdict for the plaintiff was held not supported by the evidence, and the judgment was reversed without remanding. In this case, as in the case at bar, the nature of the wounds was irreconcilable with the theory of accident.

Ingraham v. *National Union*, (Ia.), 75 N. W., 559.

Where the deceased was found leaning against the wall in his residence with his legs outstretched on the floor, his hat and pistol being found beside and partly under his body,

with a pistol shot wound in his temple at right angles to the side of the head, the court held that suicide was conclusively established. "The fact that the pistol was held at "right angles with the head when discharged and that the "deceased was standing upright, as indicated by the manner "in which he lay when found, destroys utterly the presump- "tion of accident, because of the impossibility, to say noth- "ing of improbability, of the firearm getting by any other "means than that of design, into the requisite position to "caused the wound as it is caused. *So all presumptions in "the plaintiff's favor are rebutted by the physical situation.*" And the court, after examining the testimony of the wife of the deceased as to the conduct of the deceased, just before his death, and showing that it was inconsistent with the established facts as to her own acts at the time, continued:

> "What have we left but a multitude of circumstances all pointing to and consistent with the theory of suicide and inconsistent with any other reasonable theory? Nothing that can be found in the record. * * * The jury could not have said, as men, that the circumstances did not show suicide so as to leave no reasonable probability to the contrary; therefore it was not permissible for them to say different as jurors and have that stand as the verity in the case. The court should have granted the motion to direct the verdict."
>
> *Agen* v. *Metropolitan Life Ins. Co.*, (Wis.), 80 N. W., 1020.

The same course was held proper in the similar case of *Rens.* v. *Assn.* (Wis.), 75 N. W., 99.

Any fact absolutely inconsistent with the theory of accidental death, and plainly indicating suicide, is decisive of the case. Thus where the deceased died from morphine poisoning, leaving a letter clearly indicating an intention to commit suicide, that fact was held to dispose of the conten-

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tion that he had taken an overdose by mistake, and a judgment for the beneficiary was reversed.

Mutual Life Ins. Co. v. *Hayward*, (Tex. Civ. App.), 27 S. W., 36; 34 S. W., 801.

We insist that there is no evidence in this record which can justify the verdict and judgment and that the defendant's peremptory instruction should have been given.

II.

The court erred in sustaining plaintiff's objection to the testimony offered by the defendant as to the character of the guns carried in stock by the witness Doughty, and to the effect that said witness had in his possession several lengths of guns called the Belgian gun, some long barrels and some short barrels, and that so far as the recollection of the witness is concerned he does not know whether it was a long or short barreled gun that was borrowed by Mr. Beck.

The refusal by the court to allow the witness to give this testimony was certainly error. It had already been established that Beck died from a gunshot wound received from a gun in his possession at the time. This witness had testified that before his death Beck had rented a gun from him and that it was returned after his death by O. G. Beck or Mr. Votaw. It was competent, therefore, to show by the witness the character of the guns which he kept in stock for renting purposes. A gun of unusual length (Rec., 40) was afterwards introduced into the court room and experiments were made with it in the presence of the jury. It was never proved that this gun was the gun with which Beck killed himself, and in the absence of all evidence on this point the defendant was certainly entitled to show that the rented gun in Beck's possession at the time, and which may have been the gun with which he killed himself, was short enough to per-

mit of its discharge by the deceased. Evidence as to the length of Beck's own guns was afterwards brought out by the plaintiff on the cross examination of the witness for the defense, Hilda Borg (Rec., 34) (though there was no evidence whatever that he was killed by one of those guns), and as the only shadow of evidence in support of the plaintiff's claim of accidental death consisted in the misleading experiments with the unidentified gun, the refusal of this testimony was highly detrimental to the defendant.

III, IV.

"The court erred in sustaining plaintiff's objection in objecting to allowing, and in refusing to allow, the witness Lindner to jar the stock of the gun on the floor with the hammers raised to see whether it would go off from a jar."

"The court erred in overruling defendant's objection and permitting the witness O. G. Beck to use in illustration the long-barrel gun, as there was no evidence that there was used in the killing of Beck any particular gun, and especially no evidence that the gun used in illustration did the killing."

The first ruling was patent error and it is impossible to see on what grounds the court refused to allow this experiment to be made. The plaintiff's whole theory depended on the possibility of accidental discharge of the gun, and the witness who was requested to make this experiment had just testified, in support of that theory, that a defective gun might be discharged by percussion against the ground. He was then requested to take the *identical gun produced in court as Beck's gun,* and inferentially the gun with which he had killed himself, the gun to which attention had been directed on his examination in chief, and jar it against the floor with the hammers raised, to see whether they would fall. If the witness' mere statement that the gun *might be* discharged under some circumstances was competent, clearly the demon-

strated fact that it *could not be* discharged by any blow, however powerful, was competent, on cross examination, as tending to nullify the effect of the witness' opinion as to what the fact might be. It can hardly be asserted that the *opinion* of an expert as to what ought to happen under given circumstances is better evidence than the fact itself, when that may be shown to the jury.

Aside, however, from its competency as legitimate cross examination, the defense was entitled to bring out this fact as substantive evidence on the chief issue. It struck at the heart of the plaintiff's theory, by showing that accidental discharge of the gun in question under the circumstances in evidence was impossible. It is not surprising that counsel for plaintiff interposed an instant objection.

The ruling of the court on this point is in inexplicable contrast with its ruling on the objection of defendant to the witness O. G. Beck, a brother of the deceased, making an experiment with the unidentified gun, the object of which was to show that the deceased could not reach the trigger with the gun pressed against his forehead. The only conclusion which we can draw from these inconsistent rulings is that in an action on a policy of life insurance it is competent for the beneficiary to show, by an experiment before the jury, that the death could not have happened in the way the insurer asserts it did happen; but that it is not competent for the insurer to show that it could not have happened in the way the beneficiary asserts it did.

V.

The court erred in sustaining the plaintiff's objection and not permitting the defendant to ask the plaintiff the following question: "Is it not a fact, Mrs. Beck, that you have

"stated to a great number of persons in speaking about this "case that there was no question but that Mr. Beck com- "mitted suicide, but the company couldn't prove it?"

The question which was ruled out was one which went to impeach the witness, by laying the ground for evidence of her declarations inconsistent with her testimony delivered on the trial and inconsistent with the maintenance of her suit. Mrs. Beck had just stated that she did not know, at the time of making the proofs of death, *or at the trial*, whether her husband committed suicide or not. If she had made those declarations, proof of them would have seriously impeached her credibility.

But the ruling was also erroneous because these declarations, if made, cut the ground from under the whole case of the plaintiff, being directly contradictory of the complaint. No case can be found in the books in which the plaintiff was allowed to recover after acknowledging that the defendant owed him nothing. Juries are not permitted to trifle with justice by returning verdicts for plaintiffs who acknowledge that they are not entitled to them. If the plaintiff had answered the question in the affirmative, there would have been nothing left for the court to do but to instruct the jury to render a verdict for the defendant; if in the negative, proof of such declarations would have greatly strengthened the defendant's case before the jury. It may be said that this ruling did not exclude proof *aliunde* of the declarations. But the person who makes a declaration or admission is just as competent to prove that fact as the person who heard it; and if her testimony is ruled out, it would be idle to offer other testimony to establish the same fact.

All of the errors assigned on the admission and exclusion of evidence, were ignored in the opinion of the Circuit Court of Appeals. With all due respect to that learned court, we

submit that where there is a manifest preponderance of the evidence in favor of the plaintiff in error, even if not enough to call for a peremptory instruction in his favor, every error assigned upon the exclusion or admission of evidence is entitled to the most careful scrutiny of the reviewing court. Where the verdict given by the jury is not the verdict which the reviewing court would have given if sitting as triers of the facts, the presumption is that the jury has been influenced by the errors of the trial court in admitting or excluding evidence, even more than by the errors in instructing or failing to instruct the jury as to the law of the case. So far as can be judged from the opinion of the Circuit Court of Appeals, the preceding assignments of error relating to the admission and exclusion of evidence, which were presented by the brief in that court, were not even considered.

VI.

The court erred in refusing to give the following instructions tendered by the defendant (Assignments of error, 12 and 13):

"Gentlemen of the jury, you will notice that in the proofs of death made and furnished to the defendant by the beneficiary, Lillian H. Beck, the plaintiff herein, under the policy or certificate upon which this suit is brought, it is stated under oath that the death of Frank E. Beck resulted from suicide. Under the law, this throws the burden of proof on the plaintiff to show that the statements in the proofs of loss as to the manner of the death of Frank E. Beck were made by mistake, or under a misapprehension of the facts, and unless the statements made by her in the said proofs of loss so furnished to the said defendant as to the manner of the death of Frank E. Beck are overcome by proof adduced by her, showing that her husband came to his death by accident or some other causes other than suicide, the proofs so furnished stand as conclusive evidence of the cause of death of

the said Frank E. Beck, and you will find that he committed suicide, in accordance therewith, and your verdict must be for the defendant."

"The jury are instructed that as a matter of law governing cases of this character it is held that representations made in the proofs of death as to the manner of death of the assured are intended for the action of the insurance company, and upon the truth of such representations the company has a right to rely, and that the party making such representations must be held to them until it is shown that they were made under a misapprehension of the facts, or in ignorance of material matters subsequently ascertained. The burden put upon the plaintiff by the representation of suicide makes the case one where she must show that her husband did not purposely kill himself."

These instructions state the undoubted rule, that an admission by the plaintiff, in the proofs of loss presented to the insurer, that death resulted from some cause expressly exempted by the policy, is *prima facie* evidence of the truth of the facts so admitted, *which casts upon the plaintiff the burden of disproving that evidence.* Some of the other instructions presented by the defendant on this subject are perhaps inartificially drawn, in that they appear to cast upon the plaintiff the burden, not of overcoming this *prima facie* case, but of affirmatively establishing the theory of accidental death. Such, it may be conceded, is not the law. But these two instructions are not vulnerable to any such criticism. They simply require, that, after the introduction of the proofs of loss, the plaintiff should *present evidence outweighing the evidence afterwards presented by the defendant, so as to overcome the prima facie case thus made.*

This rule is supported both by reason and authority. There is no question but that the admission by the plaintiff that the deceased committed suicide, standing alone, disproves the legal presumption—weak as are all legal presumptions—

that the deceased did not commit suicide. So much being conceded, it is obvious that the introduction of further evidence by both sides, evenly balanced or preponderating in favor of the defendant, leaves the case as if no evidence had been introduced except the proofs of loss. This rule has been affirmed in numerous cases.

A leading case on this subject is

Mutual Benefit Life Ins. Co. v. Newton, 22 Wall. (U. S.), 32.

It was there held error to exclude the proofs of death, which stated that the deceased died by suicide, on the ground that they were admissible as *prima facie* evidence of the facts stated therein against the insured and on behalf of the company.

> "They must stand as the acts of the plaintiff and the representations made therein *must be taken as true until at least some mistake is shown to have occurred in them.*"
>
> *Ibid*, 38.

So it has been ruled that a copy of the Coroner's inquest, finding death by suicide, furnished by the beneficiary with proofs of loss, is admissible in evidence and is *prima facie* proof of suicide.

Sharland v. Washington Life Ins. Co., 101 Fed., 206.

Representations as to the cause of the death of the insured, contained in proofs of death furnished by the beneficiary, operate as admissions of a material fact against interest, and while not conclusive, are competent *prima facie* evidence against the beneficiary, and, *if the plaintiff fails to give any evidence showing that the allegation in the complaint as to*

the cause of death was true, the complaint is properly dismissed.

Hanna v. *Connecticut Mut. Life Ins. Co.*, 150 N. Y., 526.

And in an earlier case in the same court where the proofs of death, if believed, established the defense of breach of warranty by the insured, it was said:

> "The burden of proof was not changed by the admission. *Unexplained it would have been conclusive, and the defense would have been made out.*"
>
> *Spencer* v. *C. M. L. Ins. Assn.*, 142 N. Y., 505, 510.

So where the defendant put in evidence the proofs of loss showing "death by his own hand and act," and no other evidence was offered by either side, it was held error to direct a verdict for the plaintiff. The court said:

> "Even if we regard as a satisfactory explanation the statement (in the replication) that this proof was furnished merely as evidence of the death of the assured, and not proof of the cause of his death, still the burden of this issue, as the statement was denied by the rejoinder, was on the plaintiff, and not on the defendant."
>
> *Prudential Ins. Co.* v. *Bruestle* (Ky.), 41 S. W., 9.

So where the plaintiff, in her proofs of death, had stated that the deceased came to his death *by suicide, this admission was held to overcome the legal presumption of death by accident and to cast upon her the burden of showing that the death was accidental.*

Keels v. *Mutual Reserve Assn.*, 29 Fed. Rep., 198.

Where the proofs of death presented by the plaintiff stated that the deceased was *supposed to have committed suicide*, it was said:

"I assume that the statement in the proof of death that the deceased was 'supposed to have committed suicide,' although not the representation of the manner of death, but of a current theory in respect to it, has so far the effect of such a representation, inasmuch as it was intended for the action of the company, as to justify the company in relying upon the assumption that the deceased committed suicide, and *put the burden upon the plaintiff of showing that the manner of death was otherwise;* and the question therefore is, do the facts in evidence warrant the conclusion reached by the jury, that such representation was not true, and that, contrary to it, the deceased was killed by the accidental discharge of his own pistol?"

And the court, after reviewing the evidence tending to establish the fact of accidental discharge and so support the burden of proof thus cast on the plaintiff, held that it was sufficient to sustain the verdict, and denied a motion for a new trial.

Cochran v. *Mutual Life Ins. Co.*, 79 Fed., 46.

So where the affidavits of plaintiff's proofs of loss, showed that the insured committed suicide, *and such evidence was uncontradicted,* a judgment for the plaintiff was *reversed without remanding.*

Dennis v. *Union Mutual Life Ins. Co.* (Cal.), 24 Pac., 120.

Where the plaintiff in making proofs of loss stated that the deceased came to his death by a "*pistol shot from his own hand,*" and these proofs of loss were put in evidence by the defendant, and no evidence to contradict them was offered by the plaintiff, it was held that the court did not err in *directing a verdict for the defendant.*

"The issuing of the policy and the death of the assured, alleged in the complaint and admitted in the answer, made a *prima facie* case for the plaintiff. The

onus was thus shifted by the pleadings to the defendant, and was assumed by it. After the conclusion of its oral testimony the defendant read in evidence the proof of claim sent on to the defendant by the plaintiff, in which it was stated that the cause of death of the assured was 'pistol shot from his own hand.' This statement, unexplained, was an admission of suicide, and *at once shifted the burden of proof upon the plaintiff.*"

Spruill v. *Northwestern Mut. Life Ins. Co.* (N. C.), 27 S. E., 39.

The rule asserted in these instructions which were rejected by the trial court has been well stated in a California case, where it was held that while the burden of proof does not shift from the party on whom it originally rests, it is quite different with the burden of meeting a *prima facie* case. When a *prima facie* case has been made the burden is upon the other party to meet the case so made, at least by evidence of equal value.

Scott v. *Wood*, 81 Cal., 398.

The court also erred in giving that part of its charge which reads as follows (assignment of error 30):

"It has been stated here in the argument, and I told Mr. Loeb I would not give it, that when there is this admission on the part of the plaintiff that death was occasioned by suicide, that then the burden of proof is shifted, and it was necessary for the plaintiff to show that it was accidental. If the proofs overcome this admission and showed that it was not correct—that it was wrong—why, then, it should not control your action. In no case that I know of is such a rule maintained, unless by some decisions in regard to insurance companies. A man may admit something from a lack of knowledge upon the subject, but if it turns out afterwards that he was misinformed, that he had not any adequate knowledge upon the subject, that admission may be disregarded, and should be disregarded. A man is only estopped

from denying his admissions and declarations when it would work a fraud upon the other party, and there is no claim in this case—no claim that it would work a fraud upon the defendant in this respect."

This was an affirmative denial of the rule above contended for and accurately formulated in the instructions tendered by defendant and rejected by the court. The giving of this charge was more harmful than the refusal of the correct instructions tendered by the defendant, as the statement of an erroneous principle is always more hurtful than the refusal to give the correct principle. The latter course at least leaves the jury at liberty to discover and apply the correct principle themselves; the former course actively misleads them.

The effect of refusing the defendant's instruction and giving that which was given, was to deprive the defendant of the presumption of law in favor of the defense of suicide created by the admission in the proofs of loss. But the court went further than this, and in that part of its charge found in Assignment of Error XIX (Rec., 59), asserted that the law presumes that the death was accidental. Where nothing but the fact of death appears, this is a correct statement of the law; *but not where suicide has been admitted by the beneficiary in the proofs of loss.* Such an admission overthrows the presumption of accidental death, and substitutes for it a new presumption of suicide, as all the cases just cited affirm. We deem it unnecessary to argue that an erroneous instruction as to the burden of proof constitutes fatal error.

VII.

The court also erred in instructing the jury as follows (assignment of error 31):

"There is only evidence before you that he was killed by a gun discharged through his head, and whether that was done with the intent by himself to commit suicide is for you to determine. If you are unable to determine that fact, then you should find for the plaintiff, because the presumption is that he didn't do it intentionally."

It was not the fact that there was "only evidence before "the jury that Beck was killed by a gun discharged through "his head." There was not only evidence of suicidal tendencies and of a state of intoxication and ungovernable rage on the part of Beck, but there was positive testimony, by the hackman Gordon, of facts inconsistent with any theory of accidental discharge presented to the jury, and therefore of suicide as a fact. The instruction would naturally be taken by the jury to mean that the evidence showed nothing but the bare fact of death by a gunshot, and they were at liberty to draw their own conclusions as to the manner in which the gun was discharged, and so the jury understood it.

The instruction was also faulty like the one last considered, in stating that the presumption is in favor of accidental death, because that presumption had been conclusively broken down by the proofs of loss.

VIII, IX.

Beck's acts show a plain violation of the criminal law. He was guilty of a breach or attempted breach of the following sections of the Montana code:

> "Every person who wilfully and maliciously disturbs the peace of any neighborhood or person, by loud

or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling * * * is punishable," etc.

Montana Penal Code, Sec. .

"Every person who, not in necessary self defense, in the presence of two or more persons, draws or exhibits any deadly weapon in a rude, angry and threatening manner * * * is guilty of a misdemeanor."

Ibid, Sec. 755.

"Every person who enters any house * * * outhouse or other building * * * with intent to commit * * * any felony, is guilty of burglary."

Ibid, Sec. 820.

"The word 'enter' as used in this chapter includes the entrance of the offender into such house * * * outhouse, or the insertion therein of * * * any instrument or weapon held in his hand, or used or intended to be used to threaten or intimidate the inmates."

Ibid, Sec. 823.

"Every person having upon him any deadly weapon with intent to assault another, is guilty of a misdemeanor."

Ibid, Sec. 831.

"Every person who maliciously injures or destroys any real or personal property not his own, in cases other than such as are specified in this code, is guilty of a misdemeanor."

Ibid, Sec. 1050.

Under the Montana code, "an act done with intent to commit a crime and tending but failing to effect its commission, is an attempt to commit that crime."

Ibid, Sec. 1229.

"Every person who attempts to commit any crime but fails or is prevented or intercepted in the perpetration thereof, is punishable," etc.

Ibid. 1230.

In every criminal act which Beck attempted to commit, whether successful or not, he was guilty of a violation of the criminal law. The evidence as to his acts is undisputed, and shows a violation by him at or immediately prior to the time of his death of each and every one of these sections of the Penal Code of Montana, as well as an attempt to commit murder.

The Circuit Court of Appeals rejected on very technical grounds the assignments of error based upon the refusal of the court to give defendant's instructions as to the defense set up by the allegation in the answer that Beck "prior to "taking his own life was attempting and did violate the "criminal law," etc. But coupled, as the allegation was, with the paragraph of the certificate exempting the defendant from liability if the death of the insured should be caused or superinduced by the violation or attempted violation of the criminal law, its meaning was plain and sufficiently advised the plaintiff of the defense which would be set up. That is all that is required of any pleading. A pleading that does this ought not to be rejected because of mere errors of grammar or construction, or inaccuracies of diction. The tendency of all modern rules of pleading is in the direction of a liberal construction which will support the cause of action or defense intended to be set up by the pleader. The object of pleading being to give notice to the opposite party of the demand which he must meet, every circumstance is seized upon to help out the defective statement of the pleader. Failure of the adversary to seasonably object, whether by demurrer, motion to make more definite or to strike out the evidence, is generally held to constitute a waiver of tech-

nical defects which might have been cured by amendment. The code states in particular, including Montana, have followed New York in abandoning the strictness of common law pleading and requiring only that the pleading should be sufficiently definite to fairly advise the opposite party as to the state of facts which the pleader's evidence will tend to establish.

The complaint and answer in this case were filed in a Montana court and their sufficiency are to be judged by the law of that State. The Montana Code has the following provisions on this subject:

> "In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed with the view to substantial justice between the parties."
>
> Montana Code of Civil Procedure, Sec. 740 (1895).

> "*No variance between the allegation in the pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits.* Whenever it appears that the party has been so misled, the court may order the pleadings to be amended, upon such terms as may be just."
>
> *Ibid.* Sec. 770.

> "The court must in every stage of the action, *disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties* and no judgment shall be reversed or vacated by reason of such error or defect."
>
> *Ibid.* Sec. 778.

The codes uniformly provide that an error or defect that does not affect a substantial right, shall be disregarded.

> Cal. Code Civ. Proc., Sec. 475.
>
> Colo. Code Civ. Proc., Sec. 81.

N. Y. Code Civ. Proc., Sec. 723.
Ore. Code Civ. Proc., Sec. 104.

This liberal rule of construction has been recognized and applied in many decided cases, and in varying language.

If the pleadings are of such a character as to advise the parties of the issues respectively made and to enable them to introduce all the evidence in their power, the purpose of the law has been effected.

Weston, etc., Co. v. *Uhlhorn,* (La.), 6 So., 486.

A defective statement in the petition of the cause of action is not a cause for reversal of the judgment, if the fact stated in the petition, when well stated, constituted a cause of action.

Crawford v. *Satterfield,* 27 Oh. St., 421.
Bethel v. *Woodworth,* 11 Oh. St., 393.
Erwin v. *Shaffer,* 9 Oh. St., 43.

A declaration can not be demurred to in the Appellate Court for insufficiency if it was not demurred to in the court below, and if it sets forth the facts intelligently and the proofs made out a sufficient case, and furnished ample material for amending it to satisfy the technical rules of pleading, it will be held good.

Burke v. *Wilbur,* 42 Mich., 327.

It is sufficient if the matter essential to the action may be implied from the allegations made.

Griffin v. *Pratt,* 3 Conn., 513.

So it was said that if the declaration is not sufficiently explicit to enable the defendant to understand it, objection should be raised by demurrer, and that the objection of indefiniteness or uncertainty is waived by not taking it.

Hall v. *McKechnie,* 22 Barb., 244.

So a reference under the rules of court waives all technical exceptions to the declaration.

Page v. *Monks*, 5 Gray (Mass.), 492.

If evidence is offered by the plaintiff at variance with the allegations of the complaint, and the counsel for defendant does not object to it at the time, nor move to strike it out upon the ground of variance, this error is waived.

Boyce v. *State Co.*, 25 Cal., 47.
Bell v. *Knowles*, 45 *id.*, 193.
King v. *DeCourcey*, 8 Colo., 463.
McDermott v. *Grimm*, 4 Colo. App., 39.
Sibila v. *Balmey*, 30 Oh. St., 399.
Cummings v. *Petch*, 41 Minn., 115.
Coates v. *First National Bank*, 91 N. Y., 31.
Gillies v. *Improvement Co.*, 147 N. Y., 420.

The only limitations on the power to permit amendments after judgment to conform the pleadings to the facts proved, are: 1. It must be in furtherance of justice. 2. The amendment must not change substantially the claim or defense.

Egert v. *Wicker*, 10 How. Pr., 193.

A variance in the evidence from the pleadings will be deemed immaterial and is to be disregarded unless the adverse party has been actually misled to his prejudice by such variance, and that fact must be proved to the satisfaction of the court.

Salazar v. *Taylor*, 18 Colo., 538.
North Star, &c., Co. v. *Stebbins*, 3 S. D., 540.
Stokes v. *Brown*, 20 Ore., 530.
Dunn v. *Durant*, 9 Daly, 389.
Catlin v. *Gunther*, 11 N. Y., 373.

So it was held that a judgment dismissing the complaint for variance between the complaint and the proof, could not be affirmed, since no motion was made in the court below to dismiss the action for failure of proof; and the court could not know, had such a motion been made, but that the proof would have been supplied.

Dunn v. *Durant*, 9 Daly, 389.

An error in pleading by which the word "plaintiff" is used instead of "defendant" will be disregarded.

> "Merely clerical mistakes such as the use of one word or one name for another, where, as in this case, there is and can be no possible room for doubt as to which one of two words or names the pleader intended to use, ought not to vitiate the pleadings in any court under the statutory rule that 'its allegations shall be liberally construed with the view to substantial justice between the parties.'"

Railway Co. v. *Dailey*, 110 Ind., 75.

So where the cross complainant used the word "defendant" as descriptive of himself, although in a cross complaint that word really designates the plaintiff in the main action, it was held not reversible error.

Warbritton v. *Demorett* (Ind.), 28 N. E., 613.

So where the complaint did not set out the contract sued on, but it was attached to the complaint as an exhibit and referred to in the complaint, it was held that the defect should have been the subject of a demurrer and was waived by answering. "The contract is before us, not denied; and "the above alleged defect is made the subject of objection "here for the first time. We are of the opinion that this "judgment ought not to be reversed on account of a mere "technicality presented for the first time in this court."

Quirk v. *Clark* (Mont.), 14 Pac., 669.

So where a plea of set-off did not sufficiently describe the notes forming the basis of said plea, it was held that though the plea was demurrable, the error was cured by the plaintiff filing a replication to the said plea and going to trial.

Pettis v. *Westlake*, 4 Ill., 535.

So where the plaintiff's right of action depended upon a demand of payment and refusal by the defendant to pay, a complaint which stated that demand had been made and that thereupon pursuant to the chattel mortgage in question (a copy of which was attached), the complainant became entitled to the possession was held good, a default being clearly implied from the facts stated.

Malcolm v. *O'Reilly*, 89 N. Y., 156.

So a declaration on a note which stated that it was payable "eighteen months," etc., was held good, although it required the addition of a word or words to make explicit the meaning of the pleader. "It is sufficiently certain to "indicate that the promise is to pay in eighteen months "from the date of the note."

Doyle v. *Knapp*, 4 Ill., 334.

So where the complaint alleged that the mortgage sought to be foreclosed allowed 10 per cent. attorney's fees to the mortgagee and the mortgage proved did not contain any such covenant, the variance was held immaterial.

Began v. *O'Reilly*, 32 Cal., 11.

So where the complaint alleged that the defendant was indebted to the plaintiff for procuring a loan while the proofs showed that plaintiff had only procured the money ready to be loaned, this was held not to present a variance. "If the allegations of the complaint were not strictly ap-

"plicable to that state of facts an amendment should have "been allowed without terms."

Engel v. *Hardt,* 56 Wis., 456.

A technical misdescription of the property, as the "northeast" instead of the "northwest" corner, is immaterial.

Paul v. *Silver,* 16 Cal., 75.

"Under our system of pleading, it is only necessary that "the cause of the indebtedness should be stated in such a "manner as to apprize the defendant of the object of the "suit." So a judgment against H., where the suit was brought against "H. & Co." was held to present no variance. The error, if any, could have been cured by the defendant demurring for defect of parties.

Mulliken v. *Hull,* 5 Cal., 245.

So where, in an action of slander, the slanderous words alleged were that the plaintiff had "stolen," etc., while the words proved were "had taken," etc., this was held a variance, but the trial judge having disregarded the variance and allowed the case to go to the jury, this was held equivalent to an amendment of the complaint.

Coleman v. *Playstead,* 36 Barb., 26.

And while it is necessary for the plaintiff to aver willingness to perform at the place of performance, an omission of the last clause is cured by verdict, and the amendment may be made without notice, when the record furnishes the only grounds for and against the same.

Clark v. *Dales,* 20 Barb., 42.

This court has not fallen behind other American courts in ignoring technical defects to which objection has not been made in apt time. Thus it has been held that error can not be assigned upon a variation between the finding of the

court and the petition, where the evidence offered by the plaintiff was not objected to in the court below nor any exception taken when the court announced its findings or subsequently when the judgment was entered.

> "It was in the power of the court to permit the petition to be amended, and the proper amendments would doubtless have been made if the objection had been stated. Under these circumstances, it must be held to have been waived by the plaintiffs in error in the court below, and they are concluded by that waiver in this court."
>
> *Railroad Co.* v. *Lindsay*, 4 Wall., 656.

And in a later case it was held that defects of form in the writ or declaration, not pointed out by demurrer, are not in general regarded in this court as good cause for reversing a judgment brought here by writ of error, as the federal courts possess the power to permit such imperfections to be amended in their discretion and upon such terms and conditions as the rules of the court prescribe.

Ewing v. *Howard*, 7 Wall., 500, citing
Stockton v. *Bishop*, 4 How., 155.

It is too late to object for the first time in an appellate court that there was a misnomer of a party;

Breedlove v. *Nicollet*, 7 Pet., 413;

that there was an insufficient replication;

Erskine v. *Hohnbach*, 14 Wall., 613;

that there was a defect in pleading;

Desobry v. *Nicholson*, 3 Wall., 420;
Coffey v. *United States*, 116 U. S., 436;
The Vaughan, 14 Wall., 258;

that the fact in issue essential to the judgment was not proved

when, for all that appears, proof might have been offered had the objection been seasonably made;

O'Reilly v. *Campbell*, 116 U. S., 418;

that the proof varied from the pleadings, when the objection might have been obviated if taken below.

Roberts v. *Graham*, 6 Wall., 578.

It is natural that the rule here contended for, that defects in pleading to which objection is not made in time to permit the correction of the defect by amendment, are waived, should be applied in the great majority of cases where the appellant, after failing to object in time, seeks to deprive the appellee of his judgment because of such defects. It is obvious upon principle that the appellant has the same right to claim the benefit of such a waiver as the appellee, and the rule was so applied in the case of

Dunn v. *Durant*, *supra*.

Instances of the application of the rule might be multiplied indefinitely without making it clearer. In the case at bar, the allegation criticised by the Circuit Court of Appeals, following the quotation from the by-laws, should be taken as stating that the death was "caused or superinduced" by the violation of the criminal law preceding it. *So the plaintiff's counsel understood it*, for no demurrer was filed to the answer, no objection was interposed to the evidence tending to show death caused or superinduced by violation of the law, nor was any instruction asked excluding this defense. *So the trial court understood it*, for it undertook to instruct the jury as to the meaning of the clause of the certificate under which this defense was asserted—though erroneously, as we shall show further on.

We do not wish to be understood as asserting that this paragraph of the answer would have been good on demurrer. When the adversary party calls attention to the uncertainty and indefiniteness of a pleading, he is entitled to have it amended, so as to aver with needful certainty and precision the cause of action or the defense which will be maintained on the trial. The rule, however, is otherwise, on grounds of manifest propriety, where he makes no objection to the defects of the pleading but accepts it as stating a good cause of action or defense, and then, after verdict and judgment, attempts to avail himself of those defects, to reverse a proper judgment against himself or retain the benefit of an improper judgment in his favor, on the ground that his adversary has not properly stated in his pleadings the state of facts which his evidence tended to establish and did establish. He is excluded from taking advantage of such defects on the plainest principles of estoppel.

The only case cited in the brief of defendant in error in the court below to sustain the judgment of the trial court, in so far as that judgment disregarded the defense of death caused or superinduced by violation of the law, absolutely established by the evidence, if the case was not one of suicide, was the case of

Conroy v. *Assn.*, 17 Ind. App., 62; 60 Am. St. Rep., 154,

the decision of an intermediate Appellate Court. That was a decision on demurrer to the answer, which failed to state facts showing a violation of the statute relied on. The deceased might have been doing all that was alleged, and yet not have violated the statute pleaded. The demurrer was manifestly well taken and should have been sustained, and the Appellate Court rendered the only judgment which it could render, in reversing and remanding the case. But if the

plaintiff had waived the defect of the answer and had gone to trial, would he have been heard to say, after judgment for the defendant on evidence showing a plain violation of the statute and the necessary causal connection between that fact and the death of the assured, that the defense so established was not properly pleaded? Most certainly not. Nor would a verdict and judgment, against the uncontradicted evidence of such a violation of the statute, have been allowed to stand, merely because the defense was unskillfully pleaded. The plaintiff having been advised that that defense would be relied on and having waived the formal defects of the plea, would be held to have accepted it as a good plea, or, as it is sometimes phrased, the plea would be construed as if it had been amended at the trial.

We earnestly insist that, under the provisions of the Montana Code, as well as under the enlightened conceptions of justice which actuate this and other American courts in the consideration of defects in pleading which have not been objected to at the proper time and in the proper manner, the unskillful statement of this defense should not prejudice this defendant. A "liberal construction" of this paragraph of the answer must sustain it; for no intelligent person who reads it in connection with the evidence, or even without the evidence, can fail to understand that what the pleader intended to aver was that the defendant was not liable because the death of the assured was caused or superinduced by the violation or attempted violation of the law. So it is impossible to say that the variance between the allegations and and proof has "misled the plaintiff to her prejudice," for she was a witness in part of the very facts on which the defense rests and knew all of them from others. Nor can it be said that any "substantial right" of the plaintiff has been infringed by this defect in pleading. Judged by any

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standard acknowledged by the rules of modern pleading, this answer, after the plaintiff went to trial without objection, is sufficient as a statement of the defense actually proved.

This assignment of error was also held bad by the Circuit Court of Appeals on the ground that "while the evi-"dence showed that very shortly prior to the time that he "was killed, he was engaged in unlawful acts, it did not "show with sufficient clearness that *he was so engaged at* "*the time he met his death* as justified the court in taking "the case from the jury."

The only interpretation that can be put upon this language is that unless the death of the insured occur at the very moment that he is doing an unlawful act, the defendant is liable. Must the thief be in the very act of removing the money from the till, the murderer in the very act of plunging his knife into the body of his victim at the time of his death, in order to afford to this defendant the exemption which it has most justly and wisely sought to obtain for its members from the enormous risks which would be incurred by an insurer of the lives of criminals? The very statement of the theory bears its own refutation. A person is engaged in the violation or attempted violation of the criminal laws from the moment that he takes the first active step to perpetrate a crime until he has finally and completely desisted from it. It may be difficult in a particular case to tell just when this moment occurs; but there can be no difficulty in this case. Beck had been for three hours at least intent upon the commission of some criminal offense; he had not desisted from the attempt when he met his death. He had, an instant before, made a felonious attack upon an inhabited dwelling house at night, an attack which would have justified his killing by anyone in the house; he had threatened on his second visit to kill his wife and had

returned to the house with a deadly weapon with the apparent purpose of carrying out his threats, and on the arrival of the officer he had not fled from, but had concealed himself on the premises. *The left barrel of the gun was loaded and cocked when found by his dead body.* Is it possible on such a state of undisputed facts to say that Beck was not engaged in the violation or attempted violation of the criminal law when he met his death?

But to exempt the defendant from liability, it is not necessary that the deceased should *have been engaged in the commission of a crime at the time of his death.* All that is required is that his death shall be "caused or superinduced" by a violation or attempted violation of the criminal laws. Can there be a doubt that Beck's death was "caused or superinduced" by such a violation or attempted violation? His presence on the premises, the hour at which he was present, his possession of the gun, his situation at the time of his death—every fact which contributed to his death, on the theory of accident, was a part of his criminal enterprise.

The court was tendered and refused the following instructions as to this defense (assignments of error XIV and XVI):

"That if the jury find that Frank E. Beck's death occurred while violating the criminal laws of the State of Montana, or while in an attempt at the violation thereof, no matter what they believe was the cause of death, suicide or accident, the plaintiff cannot recover under this policy, and you will find a verdict for the defendant."

"If Beck died while attempting to or while violating the criminal laws of the state, plaintiff has no claim under the contract between Frank E. Beck and the defendant that would entitle her to a verdict, and you are instructed if you find he was attempting to violate, or was violating the criminal laws of this state at the time of his death, the plaintiff cannot recover, and you will find for the defendant."

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In rejecting these instructions the trial court said to the jury (assignment of error XXIX):

> "Here is an instruction asked which I refused, and I wish to state here that is the instruction that if Frank E. Beck was violating any law at the time he was killed, why under the policy he cannot recover—under the by-laws. As I understand that by-law, it must be a case where a man is in the act of violating the law. For instance, if a man in breaking into a house is killed in the act, he cannot recover. If a man is in a quarrel and gets killed, he cannot recover. But if a man, contemplating that he was going to kill his wife if she didn't go home with him, but was not in the act and doing that at the time he was killed, that clause of the policy does not apply."

We do not know upon what grounds the learned judge proceeded in so narrowing the meaning of these words. It is sufficient if the death is "caused or superinduced" by the violation or attempted violation of the criminal law. Can any one say that the death of a criminal is not caused by his violation of the law unless he is killed by some one else in resisting the perpetration of the crime? If Beck had fallen in attempting to climb to a second story window for the purpose of effecting an entrance there, instead of breaking a window on the ground floor, or if he had stumbled into an unguarded well on the Nolan premises while prowling around the house with a felonious intent, could there be any doubt that the crime was the cause of his death? If, after breaking into the house he had eaten poisoned food found there, would not his crime be the cause of his death? These queries seem almost simple; yet the very act by which death ensued in this case was not less directly the result of the criminal intent of Beck than the act stated in each of these supposed cases. But the jury were instructed by the court that the paragraph on which this defense was based had no

application to such a case, so that, without wholly disregarding the instructions of the learned judge, the jury could not have returned a verdict for the defendant on this defense, although the evidence was overwhelming,—indeed, uncontradicted,—that Beck's death, if not due to suicide, was caused by a violation or attempted violation of the criminal laws of Montana.

This defense was also excluded from the case by that part of the charge as given which stated: "The investigation "narrows itself down to the question as to whether the death "of Frank E. Beck was an act of suicide, whether voluntary "or involuntary, while sane or insane, or whether it was "accidental." (Assignment of error XXII.)

The character of the exemption provided for by this clause has been interpreted in a very able opinion in the New York Court of Appeals.

Murray v. *Life Ins. Co.*, 96 N. Y., 614.

There the clause was "in or in consequence of the violation of the laws." The assured, in company with his brother, had made a brutal assault upon one A, who drew a pistol, by which the insured was shot, accidentally, as A testified. It was held that the insurer was not liable, the court saying:

> "It is said that the shooting was accidental and not voluntary or intentional, and consequently was not a death in or in consequence of a violation of law. What incidents would attend the assault could not be foreseen. They probably did not know that A had a pistol, and if they had known it, they could not have anticipated that it would be discharged in the manner stated by him. But they took the risk of his resistance to any extremity. *They took the risk of any injury which might happen to them in consequence of his handling a deadly weapon, whether such injury was intentional or accidental.* * * * If the killing under the circum-

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stances was not an unnatural result of the attack, the case is within the condition. Assuming * * * that the killing was accidental, yet the accident was the result of the struggle of A to free himself from the grasp of the brother of the insured, and the jerking of his arm by the latter. The accident, so-called, was caused by the assault, and the risk of injury from the discharge of the pistol was occasioned by the criminal act of the Murrays."

The learned Judge also gave various illustrations of death which would fall within this proviso, such as death incurred in prize-fighting or death due to the deceased falling from a housetop, or jumping from it to escape detection, while committing a burglary, or death due to the bursting of a blood vessel, occasioned by the excitement of an affray in which the deceased had voluntarily engaged.

"*It is sufficient to bring a case within the condition if there is such a relation between the act and the death that the latter would not have occurred at the time if the deceased had not been engaged in the violation of law.*"

"A known violation of a positive law, whether the law is a civil or a criminal one, avoids the policy, if the natural and reasonable consequences of the violation are to increase the risk."

Bloom v. *Franklin Life*, 97 Ind., 478.

"While the unlawful act of the assured must tend in the natural line of causation to his death, in order to work a forfeiture, it is not necessary that the act should be the direct cause, nor that the consequences which actually followed could have been foreseen. It is enough if the act is unlawful in itself, and the consequences flowing from it are such as might have been reasonably expected to happen, for in such a case the ultimate result is traced back to the original proximate cause."

Ibid.

Where the deceased was killed while walking on a railroad track which was forbidden by law, it was held that the company was not liable.

Neill v. *Ins. Co.*, 31 Up. Can., C. P., 394.

So where the deceased died in consequence of an operation intended to produce an abortion, it was held that the company was not liable.

Hatch v. *Ins. Co.*, 120 Mass., 50.

So, where the assured was driving in a race and sprang from his sulky after a collision and was knocked down and killed while pursuing his horse, the company was held not liable, racing being forbidden by the law of the state.

Insurance Co. v. *Seaver*, 19 Wall., 531.

So an accident insurance company has been held not liable for an injury sustained by the insured falling while returning to his home from hunting on Sunday, the statutes forbidding both travelling and hunting on that day. The provision of the policy was against liability for an injury "resulting wholly or partly, directly or indirectly" from a violation of law.

Duran v. *Life Ins. Co* (Vt.), 22 Atl., 530.

Conclusion.

We believe that every assignment of error which has been argued is of such a serious character that, standing alone, it would call for the reversal of this judgment. Standing together and infecting the trial with error at every stage, their effect is, we respectfully submit, irresistible. The testimony admitted over our objection was the only evidence or semblance of evidence in support of the plaintiff's theory; that re-

jected was an essential part of our defense or a complete impeachment of the plaintiff's theory. The refusal of our instructions as to the *prima facie* case made by the admissions of the plaintiff in her proofs of loss, thereby casting the burden upon the plaintiff of breaking down that *prima facie* case, was also a vital error. The same is obviously true of the court's refusal of defendant's instructions in regard to the defense of violation of the law and of the instructions given by the court on this subject, wrong in law and, under the circumstances of this case, absolutely destructive of that defense.

We insist further that, without regard to the errors in the admission or rejection of evidence or in the court's statement of the law, the error of refusing to instruct the jury to return a verdict in favor of the defendant entitles us, not only to a reversal of this judgment, but to a mandate to the trial court directing the entry of the judgment which the court should have entered. The counsel who tried the case and argued it to the Circuit Court of Appeals, relying doubtless on the strength of his case, did not present the evidence to the court with that fullness which we have deemed proper in this court, and the curt disposal of that assignment of error by the intermediate court, without discussion or statement of the evidence which in the court's opinion justified the trial court in submitting the case to the jury, would seem to indicate that the record received but a scant examination. While we have endeavored to state the whole evidence fully and fairly, we respectfully urge upon the court a careful examination of the evidence itself as found in the record, as confirming in every way our contention, that the theory of accidental death rests on mere surmise, a surmise which is contradicted by every fact in evidence and which is absolutely irreconcilable with many of the facts established beyond dispute.

This case was fully tried and the testimony of every person having any connection with the facts was heard by the jury. The only effect of granting a new trial would be to subject the defendant to the hazard of altered testimony and of the death or absence of its witnesses. We therefore pray that, if our assignment of error on this point is sustained, the trial court be directed to enter up a judgment for the plaintiff for $138 and no more.

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